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In the Supreme Court of the United States

OCTOBER TERM, 1953.

No. 27.

S. G. OLBERDING,
doing business as
VESS TRANSFER COMPANY and
CHARLES DARNELL,
Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITIONERS' BRIEF.

OPINIONS BELOW.

There was no written opinion of the District Court. The verdict of the jury and judgment of the court are at pages 46 and 47 of the record. The opinion of the United States Court of Appeals for the Sixth Circuit affirming the District Court was handed down February 12, 1953, and is reported in 201 F. (2d) 582, and appears in the record at page 60.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254, providing:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Certiorari to the United States Court of Appeals for the Sixth Circuit was granted herein on petition filed March 28, 1953, and granted May 4, 1953. (R. 67.)

STATEMENT OF THE CASE.

1. The action is for purported damage caused by the alleged negligence of defendant, Charles Darnell, in operating a motor vehicle of the defendant Olberding on County Highway 305 in McCracken County, Kentucky. Defendant Olberding is sued as the owner of the tractor and flat bed trailer on which was loaded a dozer shovel, and the defendant Darnell as the operator of said equipment when the accident occurred on the 26th day of April, 1951. (R. 1-2, R. 2-3; R. 45.)

2. The respondent, Illinois Central Railroad Company, Inc., is a citizen and resident of the State of Illinois and the petitioners S. G. Olberding and Charles Darnell are and were at all times involved in the action, citizens of Indiana and residing at Evansville, Indiana, in the Southern District of Indiana. (R. 45.)

3. The ground of jurisdiction in the United States District Court for the Western District of Kentucky, Paducah Division, is the diversity of citizenship of parties plaintiff and defendant and that the matter in controversy, exclusive of interests and costs, exceeds the sum of $3000.00. (R. 1-2.)

4. Complaint was filed in the United States District Court for the Western District of Kentucky, Paducah Division, May 10, 1951, and summons was issued for the de-

fendants, Olberding and Darnell, directed to the United States Marshal for the Eastern District of Kentucky and served on the Secretary of State at Frankfort, Kentucky, "pursuant to Chapter 188, Kentucky Revised Statutes, Sections .020-.030." (R. 3.)

5. On May 29, 1951, under special and limited appearance, the defendants Olberding and Darnell moved the Court for an order that the process and the service thereof be set aside and quashed and the action dismissed as to the individual defendants for the reason that each was a resident of the city of Evansville, State of Indiana, and at all times has been such resident, and setting up that each of the defendants insists on his right to be sued in the district court of his residence and demands application of the laws of the United States in respect to venue in this proceeding, and that the plaintiff is a non-resident of the State of Kentucky and is an inhabitant and resident of the State of Illinois, and the Court is without jurisdiction to proceed in the action over the objection of these defendants, because neither plaintiff nor defendant are citizens or residents of Kentucky or the Western District thereof. (R. 3-4.) Said motion was verified and discloses that the service of process upon the Secretary of State was beyond the Western District of Kentucky, Paducah Division, and without the purview of the Federal Statutes or the Federal Rules of Civil Procedure governing process. (R. 4-6.) Supporting affidavits disclose that neither of the individual defendants reside in the State of Kentucky or in the Western District thereof and they were served by registered mail only, and the moving affiant Olberding prays the dismissal of the action as to himself and co-defendant and that the process and the service thereof be set aside and quashed. (R. 7-8.) On July 17, 1951, the

plaintiff, Illinois Central Railroad Company, Inc., moved the Court for an order to dismiss the action as to the corporation defendant, the Brandeis Machinery and Supply Company, Inc., which motion the Court on said date sustained. (R. 9.) On the 15th day of August, 1951, the Court overruled the motion of the defendants Olberding and Darnell to set aside the service of process and quash the writ and dismiss the action as to said defendants. (R. 10.) The action of the Court in overruling the motion is Point 1 of defendants' Statement of Points on which they relied for reversal in the United States Court of Appeals. (R. 56.)

6. On August 29, 1951, under their special and limited appearance herein, defendants filed their First Defense to the plaintiff's Complaint setting out that neither plaintiff nor the defendants-appellants are or were at any time citizens or residents of the State of Kentucky; that the action is founded on diversity of citizenship and may be brought only in the judicial district where all the defendants or all the plaintiffs are residents; and claiming the privilege to be sued only in the United States District Court for the Southern District of Indiana, Evansville Division, and denying that they may be sued where found actually or constructively in the United States District Court for the Western District of Kentucky, Paducah Division, and refusing to waive their venue rights pray the Court for an order to dismiss the action as to each of them and quash the notice on the Secretary of State of the State of Kentucky as to these individual defendants-appellants and each of them. On September 15, 1951, the Court sustained the motion of the plaintiff-appellee to strike out the allegations of the First Defense on the grounds that the same were a reiteration of the defendants' motion to

dismiss the action and quash the process and this ruling of the Court in striking out Paragraphs 2 to 11 from defendants' First Defense of the Answer is Point No. 3 of Defendants-Appellants' Statement of Points on which they rely for reversal in the United States Court of Appeals. (R. 56.)

7. On October 11, 1951, the defendant, Charles Darnell, moved the Court for an order to dismiss the action herein because, among other grounds, that neither plaintiff nor defendants resided in the jurisdiction of the United States District Court for the Western District of Kentucky and setting up that Chapter 188, Kentucky Revised Statutes, entitled "Nonresident Motorist, Service of Process On," is a process and not a venue statute and neither purports to nor does affect the venue of the action, and claiming the protection of the Federal venue statute and setting up that defendants in no manner can be deprived of their federal right to be sued in the district of their residence by a purely process statute of the State of Kentucky. On October 18, 1951, the Court overruled said motion of Charles Darnell (R. 16-19), and this action of the Court in overruling defendant Charles Darnell's motion to dismiss the action is Point No. 4 relied on for reversal in the United States Court of Appeals. (R. 56.)

8. Defendants-appellants filed their Second Defense alleging that the Complaint fails to state a claim against the defendants or either of them upon which relief can be granted (R. 13), and defendants' Third Defense is a denial of the allegations of the Complaint. (R. 13.) Defendants filed their Fourth Defense that the damage complained of in plaintiff's Complaint, if any, was owing to and resulted from the negligence of the plaintiff, Illinois Central Railroad Company, Inc., its agents and employees. (R. 15.)

9. Trial was by jury at the city of Paducah in the Western District of Kentucky on December 17, 18 and 19 and resulted in the verdict for damages in the sum of $37,500.00 and judgment followed for the plaintiff-appellee, Illinois Central Railroad Company, Inc., and against the defendants-appellants, S. G. Olberding and Charles Darnell in the said sum of $37,500.00. (R. 47.)

10. It is alleged in respondent's Complaint that the Illinois Central Railroad Company, Inc., is a citizen of the State of Illinois and a nonresident of the State of Kentucky, and that the appellants, S. G. Olberding and Charles Darnell, are and were at all times involved in the action, citizens of Indiana and residing at Evansville, Indiana. (R. 1-2.) At the conclusion of the introduction of plaintiff's testimony on the trial, the parties stipulated as evidence in the cause that the Illinois Central Railroad Company, Inc., plaintiff, is and was at the time of the filing of the action and at all times since, a citizen of the State of Illinois and the individual defendants, S. G. Olberding and Charles Darnell, and each of them were at the time of the filing of the action and at all times since and now are citizens of the State of Indiana and residing in the City of Evansville, Indiana. (R. 45, 46.)

11. Excerpts of testimony are in the record. (R. 23-44.) Plaintiff introduced the deposition of the defendant Charles Darnell. (R. 23.) The witness has lived in Evansville, Indiana, since he was six years old and is now 54, is employed by the Vess Transfer Company owned by S. G. Olberding (R. 25) as a truck driver; was in McCracken County, Kentucky, on April 26, 1951. He had a caterpillar tractor on his truck loaded at Louisville, Kentucky, the same day. (R. 25.) He was driving a Chevrolet trailer loaded at the Brandeis Machinery and Supply Company, Inc. (R. 28, 29.) The overpass was 11 feet, 4 inches and

his load was about 1½ inches higher than that. The machine was a Bucyrus Dozer Shovel. (R. 32-33.)

The witness Loyce Thompson, called by plaintiff, testified he heard the truck strike the trestle or overpass and saw the driver back out from the trestle. (R. 35.)

S. W. Peters, a witness called by the plaintiff, testified that he is employed by the Brandeis Machinery and Supply Company, Inc., as office engineer and negotiated the contract with Mr. Olberding to transfer the crawler tractor from Louisville to Paducah consigned to the Smiley Sand and Gravel Company (R. 39-40) and the contract was for the entire job.

Mr. Allen Ball, called as witness for the plaintiff, testified that he lives in Paducah and was employed by Brandeis Machinery and Supply Company, Inc., as manager of the local branch at Paducah. (R. 41.) He directed the shipment to be made to the Smiley job from Louisville and on April 26, 1951, he directed Mr. Darnell how to reach the job where Mr. Smiley was working at the plant and Mr. Darnell brought the equipment back to the Paducah yard of the Brandeis Machinery and Supply Company, Inc. and left it there. (R. 42-53.) The only break that he noticed on the equipment was the part that held the upright digging apparatus and this appeared to be minor at the time. (R. 44.)

12. The judgment of the United States District Court for the Western District of Kentucky entered December 19, 1951, is as follows (R. 47):

> "The jury herein having returned a verdict for the plaintiff, Illinois Central Railroad Company, Inc., against the defendants S. G. Olberding doing business as Vess Transfer Company and Charles Darnell,
>
> "It is Ordered, Adjudged, and Decreed that the plaintiff, Illinois Central Railroad Company, Inc.,

have and recover of the defendants S. G. Olberding doing business as Vess Transfer Company and Charles Darnell, the sum of Thirty-Seven Thousand Five Hundred ($37,500.00) Dollars with interest thereon at the rate of 6% per annum from date hereof until paid, and its costs herein, for all of which execution may issue.

ROY M. SHELBOURNE,
Judge, U. S. District Court."

13. Notice of appeal was filed and served on plaintiff-appellee January 16, 1953. (R. 48.)

14. Defendants-Appellants' Statement of Points Relied on for Reversal was filed with the Clerk of the United States District Court for the Western District of Kentucky January 25, 1952, and is as follows: (R. 56):

"DEFENDANTS-APPELLANTS' STATEMENT OF POINTS—
Filed January 25, 1952.

"To the Honorable William T. Beckham, Clerk of the United States District Court for the Western District of Kentucky:

"The defendants, S. G. Olberding and Charles Darnell, and each of them now serve with their 'Designation of Contents of Record on Appeal' herein, the following concise statement of the points on which they and each of them intend to rely for a reversal thereof;

"1. The court erred in overruling the Motion of the defendants, S. G. Olberding and Charles Darnell, to quash the process and dismiss the action with supporting affidavit.

"2. The court erred in sustaining plaintiff's Motion to Dismiss the Action as to defendant Brandeis Machinery & Supply Co.

"3. The court erred in sustaining plaintiff's Motion to Strike Paragraphs 2 to 11 from defendants' First Defense of the Answer herein.

"4. The court erred in overruling defendant Charles Darnell's Motion to Dismiss the Action for Nonjoinder of Indispensable Party and for want of jurisdiction of the particular action herein.

"5. The venue of the action was wrongfully laid as to the defendants, S. G. Olberding and Charles Darnell, because each is and was at the time of the filing of the action herein a citizen and resident of Indiana.

"6. There is want of jurisdiction in the United States District Court for the Western District of Kentucky because the action is solely for personal judgment and neither plaintiff nor defendant nor any of them are citizens of Kentucky or reside in the Western District of Kentucky.

W. L. MITCHELL,
W. C. WELBORN,
MILFORD M. MILLER,
JOSEPH S. FREELAND."

SPECIFICATION OF ERRORS.

1. The court erred in giving to the process statute, Non-Resident Motorist Act, Kentucky Revised Statutes, Chapter 188, Section .020-.030 the effect of a forced waiver of the defendants' venue rights.

2. The court erred in holding the defendants waived their respective rights under the Judicial Code of the United States, Title 28 Sections 1391 (a), 1392 (a) and 1393 (a) to be sued only in the district of their physical habitation, by operating a motor vehicle in the State of Kentucky.

3. The court erred in holding that constructive service of process issuing out of the United States District Court for the Western District of Kentucky conferred jurisdiction of the persons of the defendants and of the particular action when personal service of process issued by the same court upon defendants would be unavailing, over defendants' objections, to implement the jurisdiction of the court.

4. The court erred in holding valid process issued out of the United States District Court for the Western District of Kentucky to the United States Marshal of the Eastern District of Kentucky to be served upon the Secretary of State of the Eastern District of Kentucky when neither plaintiff nor either defendant was a citizen of Kentucky nor a resident of the Western District of Kentucky.

SUMMARY OF ARGUMENT.

1. Only one court of the state has jurisdiction of an action under the Non-resident Motorist Act,—the court of the county in which the injury is done.

Sec. 74, Civil Code of Practice of Kentucky.

2. Where the process is issued by any other court it will be quashed on motion of defendant.

Kennedy v. Lee (1938), 272 Ky. 237, 113 S. W. (2d) 1125 (1126).

3. Under the construction of the Non-resident Motorist Act by the courts of the state of its adoption, the non-resident defendant can only be held to answer by process issued to the Secretary of State by the one forum, the court of the county where the injury is done.

4. There is no United States statute authorizing an action for damages to person or property to be brought in the district where the injury is done.

5. It is statutory that such actions may be brought "only" in the district where all the plaintiffs or all the defendants reside.

6. The non-resident defendant waives only the right to object to constructive service of process issued by the court of proper venue.

7. A process statute of the state which does not affect the venue rights of a defendant in the courts of the state cannot affect the venue rights of the defendant in the United States District Court.

ARGUMENT.

The question in the case arises under the Kentucky Revised Statutes, Chapter 188, Section .020 providing that the non-resident operator or owner of any motor vehicle makes the Secretary of State his agent for the service of process in any civil action instituted in the courts of the state against the operator or owner arising out of any accident or collision or damage occurring within the state in which the motor vehicle is involved. The Court of Appeals of Kentucky in the case of *Kennedy v. Lee* (1938), 272 Ky. 237, 113 S. W. (2d) 1125 (1126), holds that this non-resident motorist statute is only a process statute and that a summons issued to the Sheriff of Franklin County to be executed by delivering a copy to the Secretary of State at Frankfort is without effect when issued by a court other than that of the county where the injury was done. The court holds that the venue statute is controlling and fixes the venue in an action for injury to person or property in the county in which, in the case of a non-resident, the injury was done.

Section 74, Civil Code of Practice of Kentucky.

The injury sued on in the instant case occurred in the County of McCracken in the State of Kentucky and under

the venue act of Kentucky, the McCracken Circuit Court both before and after the enactment of the Non-Resident Motorist Act was the state court of proper jurisdiction and at all times had the jurisdiction to issue process for personal service against the defendant found within the state. The sole effect of the Non-resident Motorist Act was to make substituted service equally effective to implement the jurisdiction of the McCracken Circuit Court. The court which had the right to subject the defendant to its jurisdiction by personal service now has the right to bring the defendant into the court and proceed with or without his consent on constructive service of process.

The sole effect of the adoption of the Non-resident Motorist Act was to render valid a personal judgment for property damage upon constructive service of process issued by the court of proper venue.

There are two United States District Courts in the State of Kentucky, the Eastern and Western Judicial Districts. Neither had jurisdiction of an action for personal judgment for damage to property where neither the plaintiff nor defendant was a citizen or resident of the State of Kentucky. A summons issued out of the United States District Court of either district in an action brought by a non-resident plaintiff against a non-resident defendant if personally served on the non-resident defendant, was subject to be set aside and the service quashed on the motion of the defendant. Prior to the adoption of the Kentucky Non-resident Motorist Act if the residence requirement existed, personal judgment could be rendered only upon personal service of process.

After the adoption of the Kentucky Non-resident Motorist Act where either all the plaintiffs or all the defendants were residents of either Kentucky District, jurisdiction of the person of the defendant and of the partic-

ular action could be obtained by service of process issued out of the court of such residence to the United States Marshal of the Eastern District of Kentucky and served upon the Secretary of State at Frankfort. The sole effect upon the rights of the defendant is the same in either state or federal court. The defendant by operating his motor vehicle in the State of Kentucky gave to substituted service the same effect in obtaining jurisdiction of the person and of the action against him for damage for injury done to property as if summons were personally served upon the defendant. Only the court which had jurisdiction to issue the process for personal service prior to the adoption of the action had jurisdiction to issue effective substituted service after the passage of the act. This matter is not left to guess or hazard. The courts of the state adopting the process act had effectually defined its intent, purpose and effect upon the venue rights of the defendant under the act. The venue remains in identically the same court where it was placed by statute prior to the process act. Since the sole effect of the act is to render constructive service of process effective when issued by the court of proper venue, neither the United States District Court for the Eastern District of Kentucky nor the United States District Court for the Western District of Kentucky could obtain jurisdiction of the Non-resident motorist, or the owner of the motor vehicle, by substituted service upon the suit of a non-resident plaintiff against non-resident defendants.

There is impressed upon the Kentucky Non-resident Motorist Act as a part of the text thereof, its construction by the court of last resort of Kentucky. This rule of decision binding upon the Federal courts is supported by an unbroken line of the decisions of this Court from the earliest holdings on the subject to the latest. One of the

early statements of the rule is that of the Supreme Court in the case of *Leffingwell vs. Warren* (1862), S. C. 2 Black 599, 17 L. Ed. 261 (262):

> "The construction given to a statute of a state by the highest tribunal of such state is regarded as a part of the statute and is as binding upon the courts of the United States as the text."

This is embodied in the Rule of Decisions Act, 28 U. S. C. A. 1652. The Court of Appeals of Kentucky by its decision of the venue question under the Non-resident Motorist Act (*Kennedy vs. Lee* (1938), 272 Ky. 237, 113 S. W. (2d) 1125 (1126)) effectually closed the door to the contention that operating a motor vehicle by a non-resident motorist is, in the event of damage from the operation, a consent to be sued in any court. "This Non-resident Act" the court says, "is only a process statute." And the court holds process issued by any state court other than the court where Section 74 of the Civil Code of Practice fixes the venue, is invalid. It follows with certainty that by operating a motor vehicle in the State of Kentucky the non-resident motorist, in the event of damage from the operation waives no venue privilege granted him under the Federal venue acts.

The plaintiff invoking the Non-resident Motorist Act in any court can gain no greater rights under the Act than the state itself intended to and did grant. The defendant required to defend in any court is subjected to the loss of no other right or privilege than as defined in the plain meaning and scope of the Act.

The plaintiff gains the right to require the non-resident motorist defendant to answer upon constructive service of process issued out of the forum where the law fixes the venue. The defendant waives the right to demand personal service of process where the substituted process

is issued by the court in which the venue statutes require the action to be brought.

Prior to the decision in this case, one other and opposite decision involving a non-resident motorist act was rendered in the United States Court of Appeals for the First Circuit. In the case of *Martin vs. Fischbach Trucking Co.* (1950), 183 F. (2d) 53 (First Circuit), the defendant was a corporation which caused one of its motor vehicles to be operated in the State of Massachusetts and on whom service was obtained under the Non-resident Process Statute of that state. Diversity of citizenship was present but neither party, plaintiff or defendant, resided in Massachusetts. The defendant corporation was incorporated in Ohio and it was not licensed to do business in Massachusetts.

The Court held that the single act of causing one of its motor vehicles to be driven through the state by an agent would not constitute doing business within the state within the meaning of Section 1391 (c) of the Judicial Code.

The Court held that venue is a personal privilege which may be waived by the defendant and that *Neirbo Co. v. Bethlehem Corporation* (1939), 308 U. S. 165, does lay down the rule that the designation by a foreign corporation of an agent to receive service of process against it in a state amounts to a consent to be sued there, both in Federal and State Courts; but the Court continued that in the *Neirbo* case the appointment was in writing and operated to give express authority to receive service of process on behalf of the corporation, which laid the basis for the holding that the corporation must have thereby understood and intended that it might be sued in any court within such state and with respect to any type of action.

But, the Court continued, there was no express appointment of an agent, nor was such agency created by

any conscious or voluntary act of the defendant directed to that end. The result was one imposed by command of the law upon the doing of an act by the defendant, that is, the operation of a motor vehicle in the state. That the agency so imposed by the law could not realistically provide a basis for holding that the motorist has voluntarily waived the Federal venue privilege, which Section 1391 conferred upon him.

The Court continued to state that its view of the matter is supported by the *Restatement, Conflict of Laws*, 1948 Supp., Sec. 84.

The Court commented on the "fictional" consent to process and concluded as follows:

> "It follows from what has been said that while the defendant by operating its motor vehicle in Massachusetts subjected itself to the power of the state to require it to answer the plaintiff's claim in a suit in a state court, it did not thereby voluntarily consent to be sued or waive its federal venue privilege. The action of the District Court in dismissing the complaint was, therefore, right."

The decision in the case of *Martin vs. Fischbach Trucking Company* (1950), 183 Fed. (2d) 53 (C. A. 1), is followed in the case of *Kirksey vs. Beauchesne* (1951), 98 F. Supp. 148, and is also cited and followed in the case of *Waters vs. Plyborn* (1950), 93 F. Supp. 651.

The first case cited and relied on, in the opinion of the Court of Appeals in the present case (R. 61), is *Neirbo vs. Bethlehem Corporation* (1939), 308 U. S. 165, 170 (174).

It is believed to be erroneous to treat the single transaction of an individual operating a motor vehicle in a state as the equivalent of waiver of venue and consent to be sued, to the various activities of a foreign corporation

in seeking and obtaining permission to do business in a state, and complying with the state corporation acts by designating, through a filed written instrument, a process agent, and having a place of business and carrying on its corporate business in the state; which activities are now by the venue act declared to constitute the corporation, when sued, a resident of the state for venue purposes. There is sufficient warning in the *Neirbo* decision to avoid this error. In dealing with the effect of the deletion of the "in which he shall be found" clause from the 1887 amendment of the venue act the court (171, 172) says:

> "The restriction was designed to shut the door against service of process upon a natural person in any place where he might be caught. It confined suability, except with the defendant's consent, to the district of his physical habitation."

Nine years after the decision in the *Neirbo* case, the venue provisions of the Revised Judicial Code, Title 28, Sections 1391, 1392, 1393, were adopted. In diversity of citizenship cases against natural defendants, residence of the parties remains the test of venue. Sec. 1391 (c) provides that even in suits against corporations, the judicial district wherein the corporation is incorporated or licensed to do business or is doing business shall be regarded as the residence of such corporation for venue purposes.

The door remains shut against service of process from a United States District Court against a natural person "wherever he may be caught." And suability except with the defendants' consent is still even more clearly confined by the present venue act "to the place of his physical habitation." The doctrine of the *Neirbo* case is not the open door to forced or fictitious waivers of venue privileges. Such waiver must be actual and real, the natural result of the conduct of the defendant and not a forced or feigned

consent to be sued at a place that Congress has not designated and defendant has resisted.

Petitioners respectfully urge that the judgment herein should be in all things reversed, and the service of process upon the defendants below set aside and the summons quashed and the action in the United States District Court for the Western District of Kentucky dismissed.

WILLIAM C. WELBORN,
MILFORD M. MILLER,
Attorneys for Petitioners.

WILLIAM L. MITCHELL,
Of Counsel for Petitioners.

APPENDIX.

STATUTES INVOLVED.

The pertinent statutory provisions of Title 28, United States Code, Section 1254 (1) are:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The venue rights claimed by the defendants-appellants arise under Title 28, U. S. C. A., Section 1391 (a):

> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

Title 28, U. S. C. A., Section 1392 (a):

> "(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts."

Title 28, U. S. C. A., Section 1393 (a):

> "(a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides."

Section 74 of the Civil Code of Practice of Kentucky provides:

> "An action for an injury to the person or property of plaintiff must be brought in the county in which the defendant resides or in which the injury is done."

The provisions of the Kentucky Revised Statutes, Chapter 188, Sections .020 and .030, are invoked by plaintiff-appellee and are as follows:

"Non-resident Owner or Operator of Motor Vehicle Makes Secretary of State Process Agent.—Any nonresident operator or owner of any motor vehicle who accepts the privilege extended by the laws of this state to nonresidents to operate motor vehicles or have them operated within this state shall, by such acceptance and by the operation of such motor vehicle within this state, make the Secretary of State his agent for the service of process in any civil action instituted in the courts of this state against the operator or owner arising out of or by reason of any accident or collision or damage occurring within this state in which the motor vehicle is involved.

Service of Summons and Petition in Action Against Nonresident Motorist.—The clerk of the court in which the action is brought shall issue it to the sheriff of Franklin County. The sheriff shall execute the summons by delivering a true copy to the Secretary of State at least twenty days before the return day of the summons, and shall also deliver with the summons an attested copy of plaintiff's petition. The Secretary of State shall then write a letter to the defendant, at the address given in the petition, notifying him of the nature and pendency of the action, and enclosing in the letter the summons and the copy of the petition. The letter shall be posted by prepaid registered mail and shall bear the return address of the Secretary. The Secretary shall file a report of his action, which shall include a copy of the letter, any answer thereto, and the return registry receipt, with the clerk who issued the summons."

Title 28, U. S. C. A., Section 1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.